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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3956 OF 2001

Rajesh J. Shroff
195, Aram Nagar - II, J.P. Road
Andheri (W), Mumbai-58 ... Petitioner

V/s.

1. Hotel Centaur
Bombay Airport, Santacruz (E)
Mumbai-99

2. Union of India
(Through Hotel Corporation of
India, New Delhi)

3. A.A. Lad
Presiding Officer, 2nd Labour
Court, Bandra (E), Mumbai-51

4. Sahara Hospitality Ltd.
Unit:Sahara Star, 711-715,
Tolstoy House, 15-17, Tolstoy Marg
New Delhi, also having address at
Sahara India Point, CTS No.44
S.V. Road, Goregaon (W), Mumbai-104 ... Respondents

Mr.M.P. Vashi for Petitioner
Mr.S.K. Talsania for Respondent No.4

CORAM: **SMT.NISHITA MHATRE, J.**

JUDGMENT RESERVED ON: **OCTOBER 5, 2005**
JUDGMENT PRONOUNCED ON: **OCTOBER 28, 2005**

JUDGMENT:

. The Petitioner challenges the award in Reference IDA No.437 of 1991 whereby the Reference has been partly allowed. The Respondent No.1 has been directed to pay

an amount of Rs.100,000/- to the Petitioner as ex-gratia compensation. The Labour Court has observed that this amount is directed to be paid since the action of terminating the services was harsh and because the respondent had lost confidence in the petitioner.

2. The Petitioner was appointed as a steward in the Rottesserie restaurant of the Respondent No.1-Hotel. On 1.9.1977, he was requested by Rakesh Bhatnagar, Room Service Manager to work in the Oriental Restaurant since there was no work in the Rottesserie restaurant. The Petitioner refused to work in the Oriental restaurant. He was directed to leave the hotel premises. He refused to comply with this order. A complaint was received on 12.8.1987 at midnight by the security manager from Bhatnagar that he was called to the Rottesserie restaurant by one Dinesh Naik, a steward of the restaurant to bring to his notice certain complaints. At that time, the Petitioner, who was present according to Bhatnagar, started pushing him and pulling his neck tie. Bhatnagar claims to have resisted the Petitioner’s onslaught and another steward, Gaikwad of the Rottesserie restaurant held him in the scuffle due. Bhatnagar claims to have fallen down while attempting to open the door of the restaurant, allegedly locked by the Petitioner. Bhatnagar requested the hotel to take

action in the matter. On receipt of the complaint, the Petitioner was served with an order of suspension on 13.8.1987. A chargesheet was then issued to him on 1.9.1987. The chargesheet narrated the incident which allegedly had occurred at midnight in the Rottesserie restaurant and charged the Petitioner for having committed various acts of misconduct including committing an act subversive of discipline and riotous, disorderly or indecent behaviour on the premises of the establishment. The Petitioner denied these allegations made against him. An enquiry was instituted against the Petitioner. Several witnesses were examined by the hotel to prove the charges. However, Bhatnagar, the complainant was not examined at the enquiry. Nor were the two eye witnesses Dinesh Naik and Ravi Gaikwad. The enquiry officer submitted his findings that the Petitioner was guilty of the misconduct alleged against him. The hotel accepted the findings of the enquiry officer and dismissed the Petitioner from service on 27.8.1990.

3. The Petitioner raised an industrial dispute which was referred for adjudication in Reference (IDA) No.437 of 1991. Pleadings were filed by both parties. The Petitioner contended that the enquiry held against him was not fair and proper and that the findings

arrived at by the enquiry officer were perverse. These issues were decided by the Labour Court by award Part I dated 28.7.1998. The Labour Court was of the view that although procedurally the enquiry had been held in a fair and proper manner, the findings of the enquiry officer were perverse and, therefore, set aside the enquiry.

4. The hotel then sought to prove the charges against the Petitioner by leading evidence before the Labour Court. The hotel examined three witnesses before the Labour Court. Bhatnagar, the complainant, was not examined. All these witnesses have stated that they were told by Bhatnagar that the Petitioner had assaulted him on 12.8.1987. One of the witnesses, the senior personnel officer who had not deposed before the enquiry officer, stated that Bhatnagar had left employment of the hotel w.e.f. 17.2.1989. The petitioner examined himself before the Labour Court to rebut the evidence of the respondent. The Petitioner has denied the charge levelled against him. He has also testified that after his services were terminated, he became a member of the junior artists' association in 1991 due to which he secured roles in Hindi Television serials and cinemas. He has also admitted to maintaining himself and his family members through the money earned by him while

acting in Hindi serials and films. He has also admitted further that in the past, he had been warned.

5. By award part II dated 20.2.2001, the Labour Court held that the termination of services of the petitioner was proper. The Labour Court concluded that the petitioner had committed an act of misconduct since the material on record indicated that the petitioner was guilty of having assaulted Bhatnagar who was the room service manager. The Labour Court was of the view that the Petitioner had not tendered an apology and therefore, he could not claim that the indulgence shown to Dinesh Naik and Ravi Gaikwad, who were involved in the incident on the day in question, should be extended to him by the Respondent. These two workmen were also similarly chargesheeted. However, they were retained in service after they apologised. The Labour Court also held that since the Petitioner was not able to prove his innocence, no relief could be granted to him. Despite the fact that no eye witness was examined by the hotel nor was the complainant examined, the Labour Court was of the view that the evidence indicated that the Petitioner had assaulted Bhatnagar and as a result of which Bhatnagar had fallen on the floor and received an

injury. There was ample material according to the Labour Court to support the charge framed against the petitioner. The Labour Court therefore, directed payment of Rs.100,000/- as compensation.

5. There is no dispute that after the Petition was filed, the hotel is closed for renovation. A voluntary retirement scheme was introduced in 2003 in which almost all the workmen have accepted the payment and left the employment with the hotel which is now taken over by Respondent No.4.

6. Mr.Vashi, appearing on behalf of the Petitioner, assails the award of the Labour Court on several grounds. He submits that the Labour Court has relied on hearsay evidence to arrive at the conclusion that the petitioner was guilty as charged. The learned Advocate criticised the award of the Tribunal since the Tribunal has held that the onus is on the Petitioner to prove his innocence. He submits that there was no question of the hotel having lost confidence in the Petitioner and in the such circumstances, he claims that the petitioner is entitled to reinstatement with continuity of service and full backwages.

7. Mr.Vashi relies on the judgment of the Delhi

High Court in the case of *Management of Municipal Corporation of Delhi v/s. The Presiding Officer, Labour Court, Delhi & Ors.,* **1973 LAB.I.C.771;** of a Division Bench of this Court in the case of *Hindustan Petroleum Corporation Ltd. v/s. Yeshwant Redkar & Anr.*, **2004(3) Mh.L.J. 988** and of the Supreme Court in the case of *Central Bank of India Ltd. v/s. Prakash Chand jain,* **AIR 1969 SC 983** and *J.D. Jain v/s. The Management of State Bank of India & Anr.*, **AIR 1982 SC 673** in support of his aforesaid submissions.

8. Mr.Talsania, on the other hand, appearing for Respondent No.4, which has taken over the hotel submits that the Labour Court has considered the circumstantial evidence which was on record and has found that the Petitioner was guilty of the misconduct alleged against him. He submits that the material and the evidence on record taken as a whole indicated that the Petitioner had committed an act of misconduct. According to him, besides there being a chargesheet issued and an enquiry held there was a complaint filed by Bhatnagar which was on record. All these factors indicate according to the learned Counsel that the incident had occurred, that Bhatnagar had fallen down in the scuffle which ensued between him and the Petitioner and had thereby sustained an injury. The learned Counsel submits that the Labour

Court by a well reasoned award has granted compensation. He urges that no interference is called for under Article 226 of the Constitution of India. The learned Counsel submits that the Labour Court has exercised his discretionary powers while granting relief of Rs.100,000/- to the Petitioner, although he had found the Petitioner to be guilty of the misconduct alleged against him. He submits that once the misconduct is proved there was no question of reinstating the workman or granting any backwages to the workman or reinstating him. The Labour Court having found that the workman is guilty of the charges levelled against him, moulded the relief in a manner that would do justice to both the parties.

9. On a perusal of award part II which has been challenged, I find that the award cannot be sustained. The finding of the Labour Court that the enquiry was procedurally fair and proper need not be disturbed. After concluding that the findings of the enquiry officer were perverse, the Labour court has permitted the hotel to lead evidence in Court. While doing so, the hotel examined three witnesses. It appears that the hotel tried to examine the complainant Bhatnagar. Witness summonses were also issued to him on a couple of occasions but he did not attend the Court. No further

action was taken by the Respondent in that behalf and they contented themselves by leading evidence which according to the respondent No.4 is circumstantial evidence. For evidence to be circumstantial, the chain of events leading to the incident must be such that the in all probability the incident would have occurred. Unlike a criminal trial, the Labour Court has to consider the preponderance of probabilities. The question therefore, is whether the evidence which was led before the Labour Court amounted to circumstantial evidence or hearsay evidence. According to Mr.Talsania, the Supreme Court has not frowned upon acceptance of hearsay evidence in domestic enquiries. In fact the Supreme Court has observed that there is no allergy in accepting hearsay evidence. He submits that the judgment of the Delhi High Court in *Management of Municipal Corporation of Delhi* (supra) where it has been held that hearsay evidence cannot be accepted is impliedly overruled by the observations of the Apex Court in the case of *J.D. Jain (supra).* In J.D. Jain’s case, the Apex Court observed that the term "hearsay" has various connotations. It could mean whatever a person is heard to say on some occasions. In some instances, it could be whatever a person declares on information given by somebody else. In J.D. Jain’s case, the Bank had sought to establish a verbal

complaint made by one of the employees in the presence of four witnesses, the complainant was not examined but the 4 witnesses deposed at the enquiry. The Apex Court held that the complaint made in their presence and within the hearing of these four witnesses did not constitute hearsay evidence.

10. In the present case, the evidence recorded was that of the security officer and two other witnesses who claimed to have been informed by the complainant that an altercation between the Petitioner and himself had occurred. This evidence which has been led before the Labour Court is nothing but hearsay evidence. All the witnesses claimed to have been informed of the incident by Bhatnagar which is unlike the facts in the case of *J.D. Jain* (supra). In *J.D. Jain's* case the witnesses had seen the incident which occurred and heard the conversation since the complaint was made in their presence and within their hearing. In the present case, the witnesses have all deposed that the factum of the incident was something which Bhatnagar had informed them and therefore, it must be considered to be hearsay evidence. The witnesses were not present when the incident occurred but claim that Bhatnagar told them that he had been assaulted. Although there is no allergy to the acceptance of hearsay evidence in the

present case, the evidence on record does not establish the guilt of the workman. There is no dispute that Bhatnagar had fallen in the Rottesserie restaurant. However, there is nothing on record to indicate that the Petitioner was required to obey Bhatnagar's orders; Bhatnagar being the Room Service Manager. There is also no explanation as to why eye witnesses to the incident Dinesh Naik and Ravi Gaikwad who were in service at that time were not examined by the respondent. The findings of the Labour Court that it was for the Petitioner to prove his innocence by examining these two witnesses is erroneous. It is well settled that it is not for the delinquent workmen to prove his innocence either in a domestic enquiry held against him or before the Labour Court. When a workman is chargesheeted, it is necessary for the employer to prove the charge. The charge must stand or fall on the basis of the evidence led by the management. Loopholes in the evidence of the workman can not establish the charge against him if the management has not been able to prove the same on the basis of their own evidence. A similar view has been taken by the Division Bench of this Court in the case of *Hindustan Petroleum Corporation Ltd.* (supra). In the present case, there is evidence on record to indicate that the witnesses had been informed by Bhatnagar that he had been assaulted. The circumstances do not lead to

the unmistakable conclusion that the Petitioner is guilty of the misconduct. Besides this, the chargesheet which was issued to him mentioned that Bhatnagar was thrown back on the floor and it had resulted in a cut on his arm and the little finger of his right hand being twisted. There is no evidence on record to show that Bhatnagar had indeed been injured. No medical certificate has been produced and, therefore, the evidence does not indicate that the Petitioner had assaulted him or there was a scuffle between the Petitioner and Bhatnagar which resulted in an injury to Bhatnagar. The witnesses have deposed that they were informed by Bhatnagar about the injury. The complaint lodged by Bhatnagar on 12.8.1987 does not reveal that he had sustained any injury. he has only mentioned that he fell while trying to open the door of the Rottesserie restaurant. The evidence of Satpute, the Assistant Security Officer, shows that there was no need for Bhatnagar working as a Manager in the Oriental Restaurant to enter Rottesserie restaurant. This witness has also deposed that Naik and Gaikwad were still in service. However they were not examined by the Respondents.

10. The Labour court has not accepted the defence of the petitioner that Bhatnagar was in an inebriated

condition and that due to this, he had fallen in Rottesserie department.

11. In my view, the Labour Court has erred in finding the Petitioner guilty of misconduct alleged against him. The Respondents have not proved the allegations against the workman either on the basis of circumstantial evidence or hearsay evidence. The question, therefore, is whether the Petitioner should be granted reinstatement with continuity of service and full backwages. There is no dispute that the petitioner is now working as a film and television artist. Therefore, reinstating him in service would not be the proper relief to be granted. However, in my view, he must be compensated for the illegal act committed by the employer by terminating his services without being able to prove the charge levelled against him. In my view, the ends of justice would be met, if the voluntary retirement scheme introduced in the hotel in 2003 is made applicable to the workman by notionally reinstating him with continuity of service upto the date when the scheme was offered to all other workmen. It is made clear that the Petitioner is not entitled to backwages for the entire period since he has worked during the period he was out of employment. There is evidence to show that he earned substantially during the period he

was out of service. However, all other benefits like gratuity, provident fund, etc. must be paid to him upto the date when the voluntary retirement scheme is made applicable to him. These amounts must be paid to the Petitioner within eight weeks from today.

13. Writ Petition is disposed on the following terms:

i) The Award part II of the Labour Court is set aside.

ii) The Respondents will notionally reinstate the Petitioner in service with continuity of service upto the date when the voluntary retirement scheme was introduced and pay compensation equivalent to the amount paid to other employees under the voluntary retirement scheme which was introduced in 2003.

iii) The Petitioner will be entitled to gratuity and provident fund calculated upto the date when he is retired from service under the aforesaid voluntary retirement scheme.

iv) The Petitioner is not entitled to backwages.

14. Rule made absolute accordingly.

15. No costs.